No. 89-1598

In the Supreme Court of the United States

OCTOBER TERM, 1989

EASTERN AIRLINES, INC.

Petitioner,

versus

ROSE MARIE FLOYD and
TERRY FLOYD, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

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Respondents concede that the decisions cited by Eastern are in conflict. Instead of trying to distinguish the cases, Respondents argue that the decisions are "stale" and

they disingenuously suggest that this Court await some future claimants' case to determine whether the issue was correctly decided by the Eleventh Circuit. In fact, the decisions in *Rosman v. Trans World Airlines, Inc.*, 314 N.E.2d 848 (N.Y. 1974) and *Burnett v. Trans World Airlines, Inc.*, 368 F.Supp. 1152 (D.N.M. 1973), are not so "stale" and "insignificant" that they are no longer persuasive. The trial court below found these decisions persuasive in holding that Article 17 of the Warsaw Convention did not permit recovery for pure emotional injury. The Eleventh Circuit reversed, relying in part on cases decided shortly thereafter. *See: Karfunkel v. Compagnie Nationale Air France*, 427 F.Supp. 971 (S.D. N.Y. 1977); *Husserl v. Swiss Air Transport Company*, 388 F.Supp. 1238 (S.D. N.Y. 1975); *Krystal v. British Overseas Airways, Corp.*, 403 F.Supp. 1322 (C.D. Cal. 1975). Petitioner can see no trend in the cases that settles this important issue. If the decisions in *Rosman* and *Burnett* are stale, so too are the contemporary decisions relied upon by the Eleventh Circuit.

Nor is Eastern advocating, as Respondents state, that this Court adopt an "impact rule" for Warsaw Convention cases. In arguing that recovery under the Warsaw Convention be limited to bodily injuries or to emotional injuries manifesting themselves in physical symptoms, Eastern is advocating a prudent rule of liability, as intended by the Warsaw Convention's drafters. Although, as Respondents state, the "impact rule" has been relaxed, it has not been totally abandoned and recovery for negligent infliction of mental distress still, generally, requires some physical manifestation of psychic injury. *See, e.g., Brown v. Cadillac Motor Car Division*, 468 So.2d 903 (Fla. 1985); *Battalla v. State of New York*, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (N.Y. 1961). Intervention by this Court is necessary because the decision below incorrectly decided issues of great importance to the airline industry.

THE ELEVENTH CIRCUIT'S DECISION INCORRECTLY DECIDED THAT ARTICLE 17 PERMITS RECOVERY FOR PURE EMOTIONAL INJURY.

The Respondents do not allege that they suffered any bodily injury or impact or that the fright or shock which they allegedly suffered during the subject flight manifested itself in any physical symptoms. Their contention that the drafters of Article 17 intended to permit recovery for alleged fright or shock not susceptible of medical proof is not supported by the Convention's text, drafting history or by the subsequent conduct of the contracting parties to the Convention.[1] Article 17 of the Warsaw Convention provides:

> Le transporteur est responsable du dommage survenu en cas de *mort, de blessure ou de toute autre lesion corporelle* subie par un voyageur lorsque l'accident qui a cause le dommage s'est produit a bord de l'aeronef ou au cours de toutes operations d'embarquement et de debarquement.

(Emphasis supplied).

The official American translation of Article 17 is:

> The carrier shall be liable for damage sustained in the event of the *death or wounding of a passenger or any other bodily injury suffered by a passenger,* if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

(Emphasis supplied).

The Eleventh Circuit concluded that the French legal meaning of "lesion corporelle" was better translated into the

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[1]Pursuant to this Court's procedures, these arguments will be more fully explored in the brief on the merits.

English phrase "personal injury," and ascribed to the Convention's drafters the intent to include recovery for pure emotional injury.

In interpreting the Warsaw Convention, courts consider the French legal meaning of its terms not because "we are forever chained to French law, either as it existed when the treaty was written or in its present state of development," *Rosman, supra,* 314 N.E.2d at 853, but because it is our responsibility to "give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Air France v. Saks,* 470 U.S. 398, 399 (1985). The Eleventh Circuit's expansive construction of the French legal meaning of "lesion corporelle" places too great an emphasis on generalities of French law. Nothing in French law compels the conclusion that, in using the phrase "lesion corporelle," the drafters of the Warsaw Convention specifically intended to permit recovery for pure emotional injury. The phrase "lesion corporelle" is not a French legal term of art that identifies a particular item of damage under French law. Instead, French law distinguishes between material damage ("le dommage material") and moral damage ("le dommage moral"). Damage is "material" if it is measurable in terms of money. It generally includes property damage, lost profits, wages, support and out-of-pocket expenses. "Moral" damage is traditionally damage not considered measurable in terms of money. The term includes damage to a person's honor, as in the case of defamation, and also includes mental suffering occasioned by the death of a loved one and the pain and suffering occasioned by physical injuries to oneself. Amos and Walton's, *Introduction To French Law,* p. 209 (3d Ed. 1967) (hereinafter "Amos and Walton"). In Roman law, "corporal" injury, i.e., injury to health or life, was not considered susceptible of reparation in money. Marcel Plainol and George Ripert, *Treatise On The Civil Law,* p. 471 (11th Ed. 1939) (Louisiana State Law Institute Translation). However, such damage in civil law jurisdictions is permitted and is

occasionally identified separately as "corporal" damage. Amos and Walton, p. 209. The word "corporal" (or "corporelle"), therefore, can be used to identify and, in fact, can connote a type of damage separate and apart from moral damage. *Burnett, supra,* 368 F.Supp. at 1156, citing, *Juglart, Traite Elementaire de Droit Aerien,* 330 (1952) (De vries translation) (to permit recovery for mental injuries, Article 17 would have to be amended to read "lesion corporelle ou mentale.") Therefore, no specific intent by the Warsaw Convention's drafters can be discerned that "lesion corporelle" affirmatively includes material, moral and corporal damages.

The Eleventh Circuit's analysis is primarily based on the work of a single commentator. *See:* Rene H. Mankiewicz, *The Liability Regime of the International Air Carrier,* p. 146 (1981). Other commentators do not agree. *See:* Andreas F. Lowenfeld, *Hijacking, Warsaw, and the Problem of Psychic Trauma,* 1 Syracuse Int'l L.J. 345 (1973) (drafters of Montreal Agreement did not intend to provide for recovery for pure emotional injury); Georgette Miller, *Liability in International Air Transport,* 112, 127-129 (1977) (use of word "lesion" has restricting effect on phrase "dommage corporelle.")[5] While ostensibly determining the French legal meaning of "lesion corporelle," the Eleventh Circuit has done nothing more than adopt the broadest possible interpretation of the word "lesion" and the broadest possible interpretation of the word "corporelle" and then translated them literally into the English phrase "personal injury." *Cf., Chan v. Korean Air Lines, Ltd.,* ____ U.S. ____, 109 S.Ct. 1676, 1683-1684, n.5 (1989) (Most natural meaning of Convention's text controls unless contradicted by clear drafting history).

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[5]*See also:* James M. Grippando, *Warsaw Convention-Federal Jurisdiction and Air Carrier Liability for Mental Injury: A Matter Of Limits,* 19 Geo. Wash. J. Int'l L. & Econ. 59, 82 (1985) (judicial creation of cause of action for emotional injury under Article 17 infringes upon congressional power to delimit federal jurisdiction).

An analysis of the *context* in which the treaty's written words are used does not support the Eleventh Circuit's conclusion. *Air France v. Saks*, 470 U.S. at 399. The contextual meaning of the critical words of Article 17, "en cas de mort, de blessure, ou de toute autre lesion corporelle" indicates that the drafters intended to limit recovery to bodily injury. "Blessure" indicates a wounding resulting from physical impact. *Floyd v. Eastern Airlines, Inc.*, reprinted in Appendix to Petition, A-1, at A. 17, citing, *Mankiewicz*, page 146. Thus, when the term "blessure" is equated with and is used to modify the phrase "lesion corporelle," it is clear that the drafters of the Convention meant to narrow Article 17's application to physical injuries. *Burnett, supra*, 368 F.Supp. at 1156.

In interpreting a treaty, it is proper to refer to the records of its drafting and negotiations. *Air France v. Saks*, 470 U.S. at 400. The first draft of Article 17 resulted from an International Conference in Paris in 1925. *Id.* at 401. Originally, the carrier was to be "liable for accidents, losses, breakdowns, and delays."[3] Because French law, at the time, permitted recovery for both physical and a liberal variety of mental injuries, the Conference appointed a group of air law experts who would produce a narrower provision acceptable to nations whose law was not so liberal. *Burnett, supra*, 368 F.Supp. at 1157. The text they submitted became the present Article 17 limiting recovery to bodily injuries.

The subsequent conduct of the contracting parties confirms that Article 17 of the Warsaw Convention limits recovery to bodily injury. The purpose of the Montreal Agreement, Agreement CAB 18900,[4] was to amend the Warsaw Convention by raising the carrier's liability limits to

[3]*Le transporteur est responsable des accidents, pertes, avaries et retards.* (1925 Paris) Conference Internationale de Droit Prive Aerien 87 (1936).

[4]The Montreal Agreement is reproduced in Appendix E.

$75,000 and to waive the carrier's "due care" defenses set forth under Article 20(1) of the Warsaw Convention. The Montreal Agreement was not intended to amend Article 17 in any way. If the Montreal Agreement is referred to, however, as evidence of the signatories' practical construction of Article 17, then it is obvious that the signatories did not construe Article 17 to include damages for emotional distress.

In regard to raising the liability limits and waiving the "due care" defenses, the Montreal Agreement provides that each carrier shall include the following language in its conditions of carriage and tariffs:

> (1) The limit of liability for each passenger for death, wounding, or other *bodily injury* shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a state where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.
>
> (2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other *bodily injury* of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol.
>
> Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death, wounding, or other *bodily injury* of a passenger. [Emphasis supplied]. (App. E-1, E-2).

The Montreal Agreement further provided that it was to be filed with the Civil Aeronautics Board of the United States for approval pursuant to Section 412 of the Federal Aviation Act of 1958. The CAB's order approving the

Montreal Agreement refers to "liability for each passenger for death, wounding, or *bodily injury*," and to "any claim arising out of death, wounding, or other *bodily injury* of a passenger," and to "damage which results in death, wounding, or other *bodily injury* of a passenger." (App. E5-7). (Emphasis supplied).

Clearly, the "practical construction" of the phrase "en cas de mort, de blessure ou de toute autre lesion corporelle" adopted by the airlines which signed the Montreal Agreement, and by the Civil Aeronautics Board when it approved the agreement, was "death, wounding or other bodily injury."

The Eleventh Circuit's conclusion that Article 17 permits recovery for pure emotional injury is not supported by the Warsaw Convention's text, drafting history or subsequent conduct of the contracting parties.

CONCLUSION

Certiorari should be granted to resolve the conflict concerning the construction of the Convention by answering this fundamental question relating to carrier liability.

Respectfully submitted,

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Appendix

INDEX TO APPENDICES

APPENDCES A-D are contained in the Petition for Writ of Certiorari.

APPENDIX E:

APPENDIX E

Agreement CAB 18900

CAB Form 263
(Rev. 1-76)

AGREEMENT

The undersigned carriers (hereinafter referred to as "the Carriers") hereby agree as follows:

1. Each of the Carriers shall, effective May 16, 1966, include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government:

"The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28th, 1955. However, in accordance with Article 22(1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol, which, according to the Contract of Carriage, includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place

(1) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.

(2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol.

Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death, wounding, or other bodily injury of a passenger."

2. Each Carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention, or the Convention as amended by the Hague Protocol, and by the special contract described in paragraph 1, the following notice, which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope:

"ADVICE TO INTERNATIONAL PASSENGER ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of [certain]* [(name of carrier) and certain other] carriers parties to such special contracts for death of or

* Either alternative may be used.

personal injury to passengers is limited in most cases to proven damages not to exceed US $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately US $10,000 or US $20,000.

The names of Carriers parties to such special contracts are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative."

3. This Agreement shall be filed with the Civil Aeronautics Board of the United States for approval pursuant to Section 412 of the Federal Aviation Act of 1958, as amended, and filed with other governments as required. The Agreement shall become effective upon approval by said Board pursuant to said Section 412.

4. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any Carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with said Civil Aeronautics Board.

5. Any Carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to said Civil Aeronautics Board and the other Carriers parties to the Agreement.

31 Fed. Reg. 7302 (1966)

[Docket No. 17325; Order No. E-23680]

LIABILITY LIMITATIONS OF WARSAW CONVENTION AND HAGUE PROTOCOL

ORDER APPROVING AGREEMENT

Adopted by the Civil Aeronautics Board at its office in Washington, D.C., on the 13th day of May, 1966.

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, generally known as the Warsaw Convention, creates a uniform body of law with respect to the rights and responsibilities of passengers, shippers, and air carriers in international air transportation. The United States became a party to the Convention in 1934, and eventually over 90 countries likewise became parties to the Convention. [The Convention was amended by the Protocol signed at Hague in 1955 which has never been ratified by the United States. The Convention (subject to certain provisions) limits carriers' liability for death or injury to passengers in international transportation to 125,000 gold francs, or approximately $8,300. The Protocol, subject to certain provisions, provides for liability limitations of approximately $16,600.] On Novembar 15, 1965, the U.S. Government gave notice of denunciation of the Convention, emphasizing that such action was solely because of the Convention's low limits of liability for personal injury or death to passengers. Pursuant to Article 39 of the Convention this notice would become effective upon 6 months' notice, in this case, May 15, 1966. Subsequently, the International Air Transport Association (IATA) made efforts to effect an arrangement among air carriers, foreign air carriers, and other carriers (including carriers not members of IATA) providing the major portions of international air carriage to and from the United States to increase the limitations of liability now applicable to claims for personal injury and death under the Convention and the

Protocol. The purpose of such action is to provide a basis upon which the United States could withdraw its notice of denunciation.

The arrangement proposed has been embodied in an agreement (Agreement CAB 18900) between various air carriers, foreign air carriers, and other carriers which has been filed with the Board pursuant to section 412(a) of the Federal Aviation Act of 1958 and Part 261 of the Board's economic regulations and assigned the above-designated CAB number.

By this agreement, the parties thereto bind themselves to include in their tariffs, effective May 16, 1966, a special contract in accordance with Article 22(1) of the Convention or the Protocol providing for a limit of liability for each passenger for death, wounding, or other bodily injury of $75,000 inclusive of legal fees, and, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, a limit of $58,000 exclusive of legal fees and costs. These limitations shall be applicable to international transportation by the carrier as defined in the Convention or Protocol which includes a point in the United States as a point of origin, point of destination, or agreed stopping place. The parties further agree to provide in their tariffs that the Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of the Convention or the Convention as amended by the Protocol. The tariff provisions would stipulate, however, that nothing therein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which results in death, wounding, or other bodily injury of a passenger.

The carriers by the agreement further stipulate that they will, at time of delivery of the tickets, furnish to each passenger governed by the Convention or the Protocol and

by the special contract described above, a notice in 10 point type advising international passengers of the limitations of liability established by the Convention or the Protocol, or the higher liability agreed to by the special contracts pursuant to the Convention or Protocol as described above. The agreement is to become effective upon approval by this Board, and any carrier may become a party to it by signing a counterpart thereof and deposing it with the Board. Withdrawal from the agreement may be effected by giving 12 months' written notice to the Board and the other Carrier parties thereto.

As indicated, the decision of the U.S. Government to serve notice to denounce the Convention was predicated upon the low liability limits therein for personal injury and death. The Government announced, however, that it would be prepared to withdraw the Notice of Denunciation if, prior to its effective date, there is a reasonable prospect for international agreement on limits of liability for international transportation in the area of $100,000 per passenger or on uniform rules without any limit of liability, and if pending such international agreement there is a provisional arrangement among the principal international air carriers providing for liability up to $75,000 per passenger.

Steps have been taken by the signing carriers to have tariffs become effective May 16, 1966, upon approval of this agreement, which will increase by special contract their liability for personal injury or death as described herein. The signatory carriers provide by far the greater portion of international transportation to, from, and within the United States. The agreement will result in a salutory increase in the protection given to passengers from the increased liability amounts and the waiver of defenses under Article 20(1) of the Convention or Protocol. The U.S. Government has concluded that such arrangements warrant withdrawal of the Notice of Denunciation of the Warsaw Convention.

Implementation of the agreement will permit continued adherence to the Convention with the benefits to be derived therefrom, but without the imposition of the low liability limits therein contained upon most international travel involving travel to or from the United States. The stipulation that no tariff provision shall be deemed to affect the rights and liabilities of the carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which results in death, wounding or other bodily injury of a passenger operates to diminish any incentive for sabotage.

Upon consideration of the agreement, and of matters relating thereto of which the Board takes notice, the Board does not find that that agreement is adverse to the public interest or in violation of the Act and it will be approved.

Accordingly, pursuant to the provisions of the Federal Aviation Act of 1958 and particularly sections 102,204(a) and 412 thereof:

If is ordered, That: 1. Agreement CAB 18900 is approved.

This order will be published in the FEDERAL REGISTER.

By the Civil Aeronautics Board.

[SEAL] HAROLD R. SANERSON,
Secretary.

[F.R. Doc. 66-5494; Filed, May 18, 1966 8:49 a.m.]